

United States v. Grable, 05-30360

AUG 30 2006

BERZON, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I respectfully dissent. I do not believe that the evidence regarding Kirk Grable's character should have been admitted in his trial.

(1) Grable first challenges evidence of a prior bad act, discharging a firearm outside his girlfriend's family's trailer. The police were summoned, but before they arrived, Grable's girlfriend Matrona asked him to pass the firearm through the window so she could hide it in her bedroom. Grable challenges the admission of this evidence under Federal Rule of Evidence 404(b).

Under Rule 404(b), a prior bad act is admissible if relevant to prove the defendant's modus operandi. Matrona testified that she had no role in hiding the guns underlying the current conviction, other than ignoring one she encountered. The 404(b) evidence therefore shows a different modus operandi than the one the government alleged at trial with regard to the crime of conviction. No other basis for admitting this evidence has been suggested. The evidence was therefore inadmissible.¹

(2) Grable's second objection is to evidence of another prior bad act,

¹This evidence is certainly *probative*, as it shows Grable had guns in the past. Such evidence, however, is propensity evidence, precisely what is excluded by Rule 404(b).

involving Matrona's father finding a backpack with a gun inside it in the trailer. The only suggestion that this gun was Grable's was the father's suspicion that it was. Such suspicion is not sufficient under Rule 404(b) to "support a finding that [Grable] committed the other act." *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1062 (9th Cir. 2004). So this evidence is also inadmissible.

(3) Finally I address the most prejudicial evidence: Matrona testified *at length* about Grable's generally bad character. The evidence was not in rebuttal to any evidence of Grable's good character offered by Grable, although Grable eventually offered testimony that Matrona voluntarily signed an affidavit claiming that the guns were hers. The prosecution, in its opening statement, was the first to discuss the affidavit at trial. Grable's brother's testimony about the affidavit was not offered until *after* the prosecution's case-in-chief, in which Matrona testified about the affidavit *and* about Grable's control and abuse of her over several years, in great detail. *See United States v. Lim*, 984 F.3d 331, 335 (9th Cir. 1993) (not permitting the prosecution to anticipate a defense by introducing evidence that is only admissible as rebuttal evidence).

Under Federal Rule of Evidence 404(a),² evidence of a defendant's bad

²In pertinent part, Rule 404(a) reads:

Character Evidence Generally.—Evidence of a person's character or a

character may not be introduced by the prosecution unless the defendant has put it in issue. A defendant's mere denial of guilt is not evidence of good character subject to bad character rebuttal. *See United States v. Gillespie*, 852 F.2d 475, 479 (9th Cir. 1988). The government could not open the door for *itself* by anticipating Grable's proffer of evidence that Matrona signed a misleading affidavit—an affidavit, it appears, Grable never offered to introduce into evidence—and then rebut its own proffer with evidence, now claimed to be relevant, of *why* Matrona would sign the affidavit. By upholding the district court's admission of this evidence, the majority has permitted the government to circumvent the Federal Rules of Evidence.

Additionally, the evidence was simply not relevant. The evidence would only have been relevant if Matrona had testified that she hid the guns for Grable, because then it would show how his dominance of her caused the guns to be stored there. On the theory that he simply smuggled the guns into the trailer and hid them himself, which is the only story consistent with Matrona's testimony regarding her

trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of Accused.—Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.

knowledge of the guns, then it is *not* relevant that he treated her poorly, abused her, or controlled her in various ways. For the purpose of the prosecution's actual theory, evidence concerning the existence of this relationship with Matrona and the fact that he spent many, many hours in that room and kept personal things there would have sufficed. This irrelevant evidence prejudiced the jury and convinced it that Grable is the type of person who would break the law.

Finally, the government argues that any error in admitting this prejudicial evidence was harmless because the evidence against Grable was strong. The court may only conclude that an error was harmless if it is "more probable than not that the erroneous admission of the evidence did not affect the jury's verdict." *United States v. Hill*, 953 F.2d 452, 458 (9th Cir.1991). Although the evidence against Grable was strong, it was not overwhelming; at least one other family member had been seen bringing guns into the trailer. Matrona's testimony was highly inflammatory. I do not believe it certain that the jury would have convicted Grable without this testimony. I therefore dissent.